



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Melcher Logging Company, Inc.

File: B-235791

Date: June 19, 1989

DIGEST

Protest by awardee of timber sale that auction should have been closed on receipt of its first, lower priced oral bid, is dismissed as untimely where protest shows that awardee participated in auction procedure for 76 subsequent rounds despite knowledge of the improprieties it now alleges.

DECISION

Melcher Logging Company, Inc., protests the award to it of the Divide Blow-down Salvage Timber Sale by the Forest Service, Willamette National Forest, Oregon. Melcher argues that it should remain the successful bidder, but at a lower price than that at which the sale was awarded, because of alleged improprieties that occurred during the oral auction which followed the opening of sealed bids. For the reasons stated below, we do not think Melcher's protest is appropriate for our consideration and it is therefore dismissed.

In addition to its own account of how the sale was conducted, Melcher has submitted a corroborating affidavit from another bidder and copies of the sales solicitation, the bid of its closest competitor, and abstracts of the written and oral bids received. These documents show that the timber sale was conducted under a Forest Service procedure in which, after sealed bids have been opened and the results posted, an oral auction is conducted among those which submitted written bids.

It appears from the protest that six written bids were received, ranging from \$56,761.10 (the minimum stated in the solicitation) to \$110,391.80. During the first 19 rounds of the subsequent oral auction, in which the price was raised

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to \$178,079.60, only the protester and bidders Nos. 4, and 5, and 6 participated. The protester then entered an oral bid of \$217,860.30--an increase of almost \$40,000--at which point bidders Nos. 4 and 5 withdrew from the competition and all further bidding occurred solely between the protester and bidder No. 6. At the end of this bidding process, the protester was awarded the sale at a price of \$272,185.30, which was \$54,325 more than its initial oral auction bid. The protester contends that the award should be at its lower, initial oral auction price because of certain alleged improprieties which occurred during the conduct of the auction.

According to the protester, and as corroborated by another bidder, after the protesters initial oral bid, there was a period during which no one else entered a bid. The protester states that the Forest Service employee conducting the auction then announced the sale would end in 60 seconds. Just as time was about to expire and the employee was starting to declare the sale closed, the protester states, a representative of a logging company which had not bid (and therefore was ineligible to participate in the oral auction) asked "How much time is left," whereupon the Forest Service employee allowed additional time for bidding.

There then ensued an additional 76 rounds of oral bidding between the protester and bidder No. 6 who, the protester alleges, was being "prompted" by the representative of the ineligible firm as to what prices to offer. As we indicated above, at the end of this process the protester was the successful bidder but at a price more than \$54,000 higher than that at which it had expected to be awarded the sale.

The protester argues that the oral auction was flawed, and that therefore the results of the bidding process after the protester's opening oral bid of \$217,860.30 should be disregarded, because the Forest Service: (1) improperly allowed the oral bidding to continue after the time for bidding had expired, as a result of interference by someone who was not even eligible to participate in the sale; and (2) accepted oral bids from bidder No. 6 even though in violation of that bidder's Certificate of Independent Price Determination he was being "spoon-fed" and "prompted" by the ineligible person.

Melcher asks us to overturn the results of a bidding process in which it participated and, in fact, was successful albeit at a price higher than it had expected to pay. Melcher does not allege that it objected to the way in which the auction

was being conducted at the time it occurred. Indeed, it appears that Melcher not only participated in the extended oral auction process but was the primary contributor to the significant price increases which preceded the award of the sale to it.

Specifically, we note that after round 20, the point at which Melcher now contends the sale should have been closed, there occurred 76 more rounds of bids between it and bidder No. 6. From our review of the abstract of the oral auction, it is clear that it was Melcher who took the initiative in offering the larger price increases which were then followed by a series of nominal increases ranging from \$10 to less than \$1,000. Thus, in rounds 22, 34, 42, 64, 86 and 94, respectively, Melcher bid price increases of \$4,680, \$3,330, \$3,050, \$1,175, \$10,990, and \$10,995--which account for the majority of the price increase to which Melcher now objects. In contrast, bidder No. 6 raised the price by more than \$1,000 only once, and that was in round 87 where it did so through an increase of \$2,495.

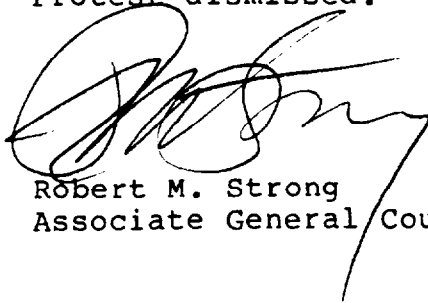
Our Bid Protest Regulations require protests of alleged solicitation improprieties to be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1988). This rule reflects the concept that it is inimical to the purposes of the bid protest system for one to participate throughout a competitive process with knowledge of an alleged deficiency in it but not protest until after the process is complete and the results are unfavorable to the protester. We think the same principle applies here.

In this case, all the circumstances to which the protester now refers were apparent at the time the auction was being conducted. Aware that the Forest Service did not close the sale upon receipt of the protester's initial oral bid, the protester nevertheless continued to participate, without complaint, in an extended auction procedure which went another 76 rounds and during which it was the protester itself who offered all but one of the major price increases.

When the Forest Service failed to close the bidding after receipt of Melcher's initial oral bid, Melcher had two choices. It could have protested the agency's action. Alternatively, it could, and did, continue to participate in the extended auction even with the knowledge of the alleged improprieties. It also could have refrained from further bidding at any time but then it would not have been the successful bidder. Melcher therefore pursued the sale through a lengthy oral auction only to attack the award

price based on facts known to it earlier. It is this continued participation in a competition with knowledge of grounds for challenging its results if unfavorable to the protester that we find inappropriate.

Protest dismissed.

A handwritten signature in black ink, appearing to read 'R. Strong', with a large, stylized initial 'R' and a long, sweeping horizontal stroke extending to the right.

Robert M. Strong
Associate General Counsel